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Attorney for Petitioner
RONALD J. MCINTOSH

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RONALD J. MCINTOSH,

Petitioner,

v.

ERIC H. HOLDER and ATTORNEY
GENERAL OF CALIFORNIA,

Respondents.

Case No. C 09-00750 CRB

**REPLY IN SUPPORT OF MOTION TO
COMPEL STATE TO COMPLY WITH
COURT ORDERED SUBPOENA**

INTRODUCTION

In his motion, Ronald McIntosh explained that the Sheriff's Office produced virtually nothing – just a few transcripts of interviews of largely irrelevant witnesses – and asked the Court to order the State and its component agencies to take further steps to find out what happened to the investigative files relating to the Ewing homicide and document those steps in declarations of people with personal knowledge. He also asked for authorization to depose people with knowledge of the whereabouts of the missing files. The State opposes, but it fails to address the defects and omissions of the State's declarations that McIntosh pointed to in his motion. Its other arguments are meritless.

ARGUMENT

In its opposition, the State argues that (a) it has "certified" that it produced all of the Ewing homicide files, (b) there is no evidence that anything has been hidden, lost or destroyed, (c) McIntosh

1 is speculating when he quotes from the police and prosecutors' in-court statements about the number
2 of witness interviews and their documentation, (d) the prosecutor's statement in closing argument
3 about hundreds of interviews was just a "colloquialism"; and (e) if interview reports hadn't been
4 produced at trial, then McIntosh's trial counsel would have said something. We address each below:

5 1. McIntosh already pointed out how the declarations of Guidotti and Caprista are
6 incomplete. Doc. 148 at 4-5. The State does not respond at all to the omissions we noted. At a
7 minimum, the State should be ordered to confer with McIntosh's counsel to draft declarations that,
8 when sworn to, would provide complete information about relevant documents and their disposition.

9 2. There are *no* interview reports of any of the significant witnesses. If they never
10 existed, then someone should swear to that fact. If they ever existed and now don't, then someone
11 should swear to what happened to them. Those facts are relevant, for example, because if the State
12 destroyed reports after McIntosh filed his original State habeas petition, then this Court would be
13 justified in drawing an adverse inference based on the spoliation of evidence.

14 3. The State's brief describes the evidence McIntosh submitted to support his claim that
15 reports existed; it came from the mouths of State employees. McIntosh's assertions are hardly
16 speculation.

17 4. If there were not, in fact, hundreds of interviews, as the prosecutor claimed, then the
18 prosecutor was exaggerating (or lying); he was not using a "colloquialism." In any event, the State's
19 attempt to explain away the prosecutor's and police testimony is pure speculation; McIntosh provided
20 *evidence* that those interview memos existed.

21 5. McIntosh's trial counsel likely did not jump up and object when the prosecutor
22 referred to hundreds of interviews and binders of evidence because there were, in fact, hundreds of
23 interviews and much evidence. The question is whether there were memos documenting the many
24 interviews that Singleton and Dirickson conducted and whether *all* of those memos were disclosed to
25 McIntosh. For example, ADA Murray has already sworn that he sent the two officers to Southern
26 California to interview Green; the officers cannot recall whether they conducted the interview or not.
27 The question is whether they documented their visit in some way.
28

CONCLUSION

Yet again, the State hunkers down and refuses to help McIntosh get at the truth. Its declarations and document retention may have been sloppy, or the State and its agencies may have made a calculated decision to destroy evidence. In either case, McIntosh is entitled to know whether the information he has sought for so long exists and, if not, what happened to it.

For these reasons, McIntosh requests that the Court sign the proposed order at Doc. 148-2, and, in addition, direct the State to engage in meaningful discussions to provide complete declarations from Guidotti and Caprista, or other relevant witnesses.

Dated: August 27, 2015

BOERSCH SHAPIRO LLP

/s/David W. Shapiro
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